LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 19 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 1044

JIGGS, INC., PHILIP LEVINE, PHYLLIS LEVINE, JOSEPH LEVY, IRENE LEVY and I. E. INCORPORATED,
Petitioners,

AGAINST

SLUMBERTOGS, INC., HERBERT B. LEVENSON and "JULI" LEVENSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

JIGGS, INC., PHILIP LEVINE, PHYLLIS LEVINE, JOSEPH LEVY, IRENE LEVY and I. E. INCORPORATED,
Petitioners,
No. 47 Tiffany Place,
Brooklyn, New York.

MAXIMILIAN BADER and
I. WALTON BADER,
Counsel for Petitioners,
No. 170 Broadway,
New York, New York 10038.

LODER APPEAL PRESS, INC., 41 VESEY STREET, NEW YORK, N. Y. WOrth-2-0689

INDEX

	PAGE
Jurisdiction	1
Citation of Opinions Below	2
Facts Involved	2
POINT I.—Certiorari should be granted herein because the determination made by this Court constitutes a direct violation of the Fifth Amendment to the Constitution of the United States in that said determination has deprived petitioners of property (a valuable trademark) without due process of law	7
POINT II.—Certiorari should be granted in the instant case because of a conflict between the instant determination of the Court of Appeals for the Second Circuit and the Courts of Appeals of the Tenth Circuit and the Eighth Circuit	10
POINT III.—Certiorari should be granted herein because of the failure of the Court of Appeals for the Second Circuit to follow its own prior decisions and to follow a decision in the instant case made by another panel of the same court	12
POINT IV.—The failure to give notice to the petitioners that a judgment by default would be taken against them makes a judgment so entered absolutely void	13
POINT V.—Even assuming that the default judgment was validly entered the District Judge erred in failing to set it aside	14

PAGE

POINT VI.—The facts herein did not justify the District Judge in granting the drastic penalty against the appellants under the facts set forth herein 16

POINT VII.—All documents and papers were produced by petitioners in this case whenever an order was made for their production even in cases where the petitioners felt that the orders were too drastic and sought from time to time to limit the same 18

CONCLUSION 19

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Opinion of the Court of Appeals for the Second Circuit 20

Original Opinion of the United States District Court for the Southern District of New York 22

Endorsement, April 7, 1965 22

Judgment Apppealed From 26

Order Filed May 4, 1965 28

Notice of Motion 29

Endorsement on Notice of Motion to Move for Extension of Time, etc. 30

CASES CITED

PAGE

Ackerman v. U. S., 179 Fed. (2nd) 236, affirmed 340 U. S. 193 9

Alopari v. O'Leary, 154 Fed. Supp. 78 ..... 12, 15

Barber v. Turberville, 218 Fed. (2nd) 34 15

Bruning v. U. S., 376 U. S. 358 11

Commercial Casualty Insurance Co. v. White Line, etc., 8 Cir. 114 Fed. (2nd) 946 ..... 11, 14

Dalminter, Inc. v. Jessie Edwards, Inc., 27 F. R. D. 491 ..... 11, 14

DiBella v. U. S., 369 U. S. 121 11

Elias v. Pitucci, 13 F. R. D. 13 16

Flora v. U. S., 357 U. S. 63 11

Galvan v. Press, 347 U. S. 522 9

Gill v. Stolow, 2 Cir. 240 Fed. (2nd) 669 ..... 12, 17

Haynes v. U. S., 353 U. S. 81 11

Huntington Cab Co. v. American Fidelity and Casualty Company, 4 F. R. D. 496 ..... 13, 15

Kantor Bros. v. Mutual Construction Co., 3 F. R. D. 227 16

Meeker v. Rizley, 10 Cir. 324 Fed. (2nd) 269 ..... 11, 14

McNabb v. U. S., 318 U. S. 322 9

PAGE

NLRB v. Duval Jewelry Co., 357 U. S. 1 11

NLRB v. New Syndicate Co., 365 U. S. 695 11

Nunn v. Reina, 21 F. R. D. 573 ..... 13, 15

Rainwater v. U. S., 356 U. S. 590 11

Rogers v. Quan, 357 U. S. 193 11

Societé Internationale v. Brownell, 357 U. S. 197 .. 9

Tozer v. Charles A. Krause Milling Co., 3 Cir. 189 Fed. (2nd) 242 ..... 13, 15

U. S. v. Carlo Bianchi & Co., 373 U. S. 709 11

U. S. v. F. & M. Schaefer Brewing Co., 356 U. S. 227 11

STATUTES CITED

Constitution of the United States, Fifth Amendment 9, 10

28 USC §1254(1) 1

AUTHORITIES CITED

Calendar Rule 5(a)(8) of the United States District Court for the Southern District of New York .. 4

Rule 55(b)(2) F. R. C. P. 10

Rule 37(a) F. R. C. P. 7

Rule 37(b) F. R. C. P. 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. .....

JIGGS, INC., PHILIP LEVINE, PHYLLIS LEVINE, JOSEPH LEVY, IRENE LEVY and I. E. INCORPORATED,

Petitioners,

AGAINST

SLUMBERTOGS, INC., HERBERT B. LEVENSON and "JULI" LEVENSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioners herein hereby apply to this court for a writ of certiorari to the Court of Appeals for the Second Circuit seeking review of a determination by that court which affirmed an order and judgment of the United States District Court for the Southern District of New York striking out the answer of the defendants in Action No. 1 and entering a default judgment in said action, dismissing Actions Nos. 2 and 3 and refusing permission to said petitioners to cure said default.

Jurisdiction

The court has jurisdiction to grant the relief sought herein pursuant to 28 USC §1254(1). The decision of

the Court of Appeals to which objection is taken was made on December 7, 1965. This petition is filed within three (3) months of said determination as required.

Citation of Opinions Below

See Appendix.

Facts Involved

Petitioner Joseph Levy, for many years, utilized the trademark "SLUMBA-TOGS" in his business. Levy was a controlling stockholder of Slumba-Togs Manufacturing Corporation (a Pennsylvania corporation) long prior to any date of first use of the respondent Slumbertogs, Inc.'s alleged trademark. Long after use by petitioner Joseph Levy of his "SLUMBA-TOGS" trademark on a large scale the respondent Slumbertogs, Inc. commenced utilizing a trademark known as "SLUMBERTOGS". In 1957 Levy's corporation litigated the matter in connection with an infringement suit brought by respondent Slumbertogs, Inc. and, after trial on the merits, the court dismissed the complaint. Subsequently Levy assigned his rights to his "SLUMBA-TOGS" trademark to the petitioner Jiggs, Inc. and respondent Slumbertogs, Inc. brought a second suit for alleged trademark infringement against Jiggs, Inc. Because of claimed defective title Judge Murphy of the United States District Court for the Southern District of New York granted a preliminary injunction against the petitioner Jiggs. After filing appropriate corrective assignments Judge Bryan of the same court vacated this preliminary injunction and the determination was affirmed by the Court of Appeals for the Second Circuit. A bill of costs was entered against

the respondents Slumbertogs, Inc. and, despite such entry, respondent Slumbertogs, Inc. willfully and deliberately failed to pay this bill of costs.

While these proceedings were pending petitioner Joseph Levy commenced his own action against the respondents and petitioner Jiggs, Inc. commenced its own action against the controlling stockholders of Slumbertogs, Inc. These three (3) actions then continued together in unconsolidated form.

Subsequently, after extensive depositions were taken by the respondents Action No. 1 was placed on the trial calendar of the United States District Court for the Southern District of New York. General Rule 9(1) of the General Rules for the United States District Courts for the Southern and Eastern Districts of New York reads as follows:

> "No motion except for judgment or other final relief will be entertained in a case after it has reached the Permanent Calendar pursuant to the Calendar Rules unless the moving party has first obtained an order from the Part I Judge granting permission to make such motion. Application to the Part I Judge for such an order must be made on five (5) days' notice to all parties who have appeared in the action upon a showing by affidavit that circumstances arising subsequent to the date when the case reached the Permanent Calendar require that the motion sought to be made is necessary in the interests of substantial justice. This subdivision does not apply to motions or applications which are required to be made to the Part I Judge under the Calendar Rules."

Calendar Rule 5(a)(8) of the United States District Court for the Southern District of New York reads as follows:

> "(a) A party desiring to place a cause upon the trial calendar may file with the clerk, with proof of service thereof upon the attorneys of all parties who have appeared, a note of issue signed by an attorney of record stating:
>
> (8) That the parties have taken, or have had reasonable opportunity to take and complete necessary depositions and other discovery proceedings;"

Despite such representation the respondent Slumbertogs, Inc. served a set of interrogatories upon the petitioners Jiggs, Inc., Philip Levine, and Phyllis Levine. Petitioner Jiggs did not desire to become overly technical and hence made preparations to answer these interrogatories. However the person having knowledge of the facts was not the petitioners Jiggs, et al., but was actually Joseph Levy. Hence these interrogatories could not be answered until a consolidation of the actions was made. Accordingly an order was obtained on February 3, 1965 enlarging the time to answer such interrogatories until the actions involved were consolidated. The application was granted by Judge Cashin of the United States District Court for the Southern District of New York. Nevertheless, despite Judge Cashin's order, respondent Slumbertogs, Inc. moved in the United States District Court for the Southern District of New York to strike the defendants' answer in Action No. 1 upon the alleged ground that said defendants had failed to answer interrogatories. Defendants cross-moved for an order consolidating the three (3) pending actions. Chief Judge Ryan of the United States District Court for the South-

ern District of New York granted the application to consolidate but further required that application be made by April 19, 1965 to set the case down for trial before a judge to be designated. Judge Ryan further stated that if such application was not made prior to this date an *ex parte* order would be entered dismissing all suits. Judge Ryan further ruled that defendants would be given an additional ten (10) days to answer the pending interrogatories.

Apparently, in the New York Law Journal, a publication bearing the ambiguous notation "see memorandum" was published but this was apparently overlooked by all three (3) counsel representing petitioners. The clerk's docket of the United States District Court for the Southern District of New York indicates that notice of the entry of an order was mailed to three (3) separate attorneys for the petitioners (all of such attorneys having different offices in different parts of the City of New York). All of said attorneys have submitted affidavits that no notice of the entry of such order was ever received by them. The alleged "Notice" contained no details of the contents of the order, nor any time limit contained therein.

After expiration of the ten (10) day period set forth in the court's determination of April 7, 1965 the respondent Slumbertogs, Inc., ex parte, and *concededly without any notice to any of the attorneys representing the adverse parties* submitted a judgment granting a permanent injunction against the petitioners restraining said petitioners from utilizing their valuable trademark "SLUMBA-TOGS", dismissing Actions Nos. 2 and 3 on the merits and with costs.

Application was then made before Judge Ryan to vacate the petitioners' default upon the ground that they

had never received notice of the order. Appropriate affidavits were submitted by three (3) well known members of the Bar of the State of New York certifying to the fact that they had never received notice of Judge Ryan's order and requesting an additional period of ten (10) days to serve their answers to the interrogatories since the Actions had now been consolidated and the interrogatories could now be answered by the proper party, Joseph Levy. The petitioners' counsel informed Judge Ryan, on this application, that the interrogatories could be answered within a matter of days and even could be answered within twenty-four (24) hours. Prior to receipt of notice of Judge Ryan's second determination the interrogatories were, in fact, answered and answers filed. Nevertheless Judge Ryan denied the petitioner's application to vacate his prior order.

An appeal was then taken to the Court of Appeals for the Second Circuit. Consistently attempting to rely on technical objections and defenses and in order to avoid a determination on the merits the respondents made an application to dismiss the appeal upon the alleged ground that the Appendix was not in accordance with the rules. Petitioners cross-moved for an order holding the Appendix adequate. The Court of Appeals (a different panel of judges than the panel making the determination for which review is sought herein) granted petitioners' motion and rendered the following opinion:

> "• • • Motion granted and appendix declared to be adequate compliance with this Court's order of July 8, 1965. The Order of July 14, 1965, entered pursuant to Judge Friendly's direction permits appellees' brief to be served on or before September 27, 1965. The clerk is requested to place these consolidated appeals on the calendar

immediately thereafter if possible. Whatever may be the ultimate merits of the parties' contentions, they should be aired before a trial court and not be endlessly avoided by a long series of procedural motions."

Thereafter the appeal itself came on for hearing before the Court of Appeals before a different panel of judges than the judges who made the determination above quoted. This panel failed to follow the determination of the prior panel but affirmed Judge Ryan in all respects. It is from this order of affirmance that the instant petition for a writ of certiorari is being taken.

POINT I

Certiorari should be granted herein because the determination made by this Court constitutes a direct violation of the Fifth Amendment to the Constitution of the United States in that said determination has deprived petitioners of property (a valuable trademark) without due process of law.

The sole justification for the drastic penalties imposed upon the petitioners must be found in Rule 37(a) F. R. C. P., the pertinent portion of which reads as follows:

"• • • Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. • • •"

Rule 37(b) F. R. C. P., provides in part as follows:

> "* * * (2) OTHER CONSEQUENCES. If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:
>
> * * * (iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; * * *"

Until the motion to consolidate was granted, in view of Judge Cashin's order (which Judge Ryan could not find when he made the determination complained of) there could be no refusal to answer. Subsequently Judge Ryan had the power to direct the petitioners to answer but, in such event, the sanctions provided for under Rule 37 could not be imposed until the petitioners willfully refused to comply with Judge Ryan's order. Since the petitioners had no notice of such order the granting of sanctions against petitioners was not warranted.

Furthermore the interrogatories which were not answered were served only in connection with Action No. 1 and any sanctions could only be imposed upon the peti-

tioners in Action No. 1. There was no refusal to answer *any* interrogatories in connection with Actions Nos. 2 and 3.

This court in *Societé Internationale* v. *Brownell,* 357 U. S. 197, makes it quite clear that this court will consider the employment of any remedy which is not justified by the circumstances of the case as a violation of the party's constitutional rights and failure to give such party "due process of law". Furthermore this court has further held in *Galvan* v. *Press,* 347 U. S. 522, fair play is the essence of "due process". This court also held in *McNabb* v. *U. S.,* 318 U. S. 322; *Ackerman* v. *U. S.,* 179 Fed. (2nd) 236, affirmed 340 U. S. 193, that "due process" requires that a litigant have the right to present his claim including any defenses that he may have. If the determination of the Court of Appeals for the Second Circuit is allowed to stand unreviewed in this case it is respectfully submitted that a direct violation of the Fifth Amendment of the United States has been committed.

Here the petitioners, merely because they did not file answers to certain interrogatories *by a certain date,* and where a prior order of this court granted them time to file such answers until subsequent to the granting of a motion to consolidate, and where answers to such interrogatories were, in fact, filed as soon as the petitioners obtained notice of such determination, were nevertheless deprived of their valuable trademark rights, subjected to a substantial bill of costs, and enjoined from utilizing a trademark that they had utilized for many years. Furthermore the court dismissed substantial antitrust claims which petitioners had against respondents which would have resulted in judgments against respondents for large sums of money. A more direct violation of

the provisions of the Fifth Amendment to the Constitution of the United States would be hard to find. The constitutional point was raised by petitioners before the Court of Appeals but ignored in that Court's opinion.

There are other substantial violations of due process involved in this action. These violations will be set forth subsequently in succeeding points. In particular petitioners complain of the failure of the Court of Appeals to follow the provisions of the Federal Rules of Civil Procedure, the failure of the Court of Appeals to follow prior determinations of its own court, and failure of the Court of Appeals to follow a prior determination of a different panel of the same court in this very action.

POINT II

Certiorari should be granted in the instant case because of a conflict between the instant determination of the Court of Appeals for the Second Circuit and the Courts of Appeals of the Tenth Circuit and the Eighth Circuit.

The judgment entered against the petitioners was based upon a provision in the order of Judge Ryan holding that, if the petitioners failed to answer certain interrogatories within ten (10) days from the date of entry of the order that a judgment by default would be entered *ex parte* and *without notice.* Concededly no *copy of Judge Ryan's order with notice of entry* was ever served upon *any* attorney for the petitioners nor was any copy of the application for judgment by default ever served upon *any* attorney for the petitioners. This constitutes a direct violation of Rule 55(b)(2) F. R. C. P. which reads as follows:

> "* * * If the party against whom judgment by default is sought has appeared in the action he * * * shall be served with written notice of the application for judgment at least three (3) days prior to the hearing on such application. * * *"

The Court of Appeals, in affirming the determination of Judge Ryan, completely ignored the provisions of this rule, even though this rule was brought to the court's attention and the point specifically *raised* on this appeal. The Courts of Appeals of both the Tenth and the Eighth Circuits have specifically held to the contrary. For example in *Meeker* v. *Rizley,* 10 Cir. 324 Fed. (2nd) 269 (271), the Court of Appeals of the Tenth Circuit, in setting aside a default judgment entered without the proper notice, had this to say:

> "* * * We need not determine in this instance whether the default judgment entered was void or voidable, since the failure to give the required three day notice constitutes cause for setting it aside. * * *"

To the same effect is *Commercial Casualty Insurance Co.* v. *White Line, etc.,* 8 Cir. 114 Fed. (2nd) 946; *Dalminter, Inc.* v. *Jessie Edwards, Inc.,* 27 F.R.D. 491.

Where conflict between circuits is involved this court hash generally granted certiorari to resolve the conflict. See, for example, *Bruning* v. *U. S.,* 376 U. S. 358; *U. S.* v. *Carlo Bianchi & Co.,* 373 U. S. 709; *DiBella* v. *U. S.,* 369 U. S. 121; *NLRB* v. *New Syndicate Co.,* 365 U. S. 695; *Flora* v. *U. S.,* 357 U. S. 63; *Rogers* v. *Quan,* 357 U. S. 193; *NLRB* v. *Duval Jewelry Co.,* 357 U. S. 1; *Rainwater* v. *U. S.,* 356 U. S. 590; *U. S.* v. *F. & M. Schaefer Brewing Co.,* 356 U. S. 227; and *Haynes* v. *U. S.,* 353 U. S. 81.

POINT III

Certiorari should be granted herein because of the failure of the Court of Appeals for the Second Circuit to follow its own prior decisions and to follow a decision in the instant case made by another panel of the same court.

The procedural history of this case indicates actual "procedural anarchy". Based upon the facts involved herein, and particularly noting that the petitioners' alleged "default" was neither willful or deliberate, the Court of Appeals for the Second Circuit has repeatedly held that, under such circumstances, a determination similar to that made by Judge Ryan will not be sustained. This court's attention is specifically called to the case of *Gill* v. *Stolow*, 2 Cir. 240 Fed. (2nd) 669 (672), where the Court of Appeals for the Second Circuit in vacating a "default judgment" based upon a party's alleged failure to allow discovery by his adversary had this to say:

> "• • • In final analysis, a court has the responsibility to do justice between man and man, and general principles cannot justify denial of a party's fair day in Court except upon a serious showing of willful default. • • • "

The above principle of law has been consistently followed by courts in other jurisdictions. For example in *Alopari* v. *O'Leary*, 154 Fed. Supp. 78 (80), the court said:

> "• • • A motion to set aside a default is addressed to the discretion of the court. Any doubt should be resolved in setting aside defaults so that every case may be decided upon the merits. • • • "

To the same effect is *Huntington Cab Co.* v. *American Fidelity and Casualty Company,* 4 F. R. D. 496; *Tozer* v. *Charles A. Krause Milling Co.,* 3 Cir. 189 Fed. (2nd) 242; and *Nunn* v. *Reina,* 21 F. R. D. 573.

As a matter of fact, in the case at bar, the Court of Appeals for the Second Circuit failed to follow a prior determination *of the same court in the same case.* As pointed out, *supra,* the court previously determined that this action should proceed promptly to trial but then made the determination complained of.

Under these circumstances it is respectfully submitted that not only has "due process" been violated but the Court of Appeals itself has been guilty of procedural anarchy and of a failure to follow its own prior determinations.

POINT IV

The failure to give notice to the petitioners that a judgment by default would be taken against them makes a judgment so entered absolutely void.

It will be observed that the order which brought about a default judgment in this case did not call for service of same on the petitioners. As a matter of fact no statement which directed that answers to interrogatories be served by a certain date was ever communicated to the petitioners. While the statement is made that notice of such order was given to the petitioners (which is denied by the petitioners who submitted affidavits to prove that they never received such notice) such notice nevertheless would be only in a form to advise the petitioners that "an order has been entered". This of course would not be any notice that answers to interrogatories should be

served by a certain date and publication in the Law Journal referred to in the decision of the District Judge would also be to the effect that a court memorandum was filed in this case. To put the party in default more is needed than merely a postcard advising them that an order has been entered. The default would never have occurred if the parties had been specifically told when answers to interrogatories should be served.

The case of *Meeker* v. *Rizley*, 10 Cir. 324 Fed. (2nd) 269 (271), is directly in point. In that case, where a default judgment was entered without the proper notice, the court had this to say:

> "* * * We need not determine in this instance whether the default judgment entered was void or voidable, since the failure to give the required three day notice constitutes cause for setting it aside. * * *"

To the same effect is *Commercial Casualty Insurance Co.* v. *White Line, etc.*, 8 Cir. 114 Fed. (2nd) 946; *Dalminter, Inc.* v. *Jessie Edwards, Inc.*, 27 F.R.D. 491.

POINT V

Even assuming that the default judgment was validly entered the District Judge erred in failing to set it aside.

The petitioners, when they finally received notice of the default judgment, promptly moved before the District Judge to set it aside. The petitioners claimed that they had never received notice from the clerk of this court of the entry of the original order. This was certified to by the three (3) attorneys who were entitled to notice of the

District Judge's order, and, in fact, on the hearing before the District Judge, the petitioners' counsel demanded to know if the petitioners' counsel had received notice of the entry of the order. The District Judge did not permit an answer to this question.

Under these circumstances the court erred in failure to relieve the petitioners of their default. Even if the court had the power to enter such default judgment, its failure to do so was an abuse of discretion.

A case almost directly in point is *Alopari* v. *O'Leary*, 154 Fed. Supp. 78(80), where the Court said:

> " * * * A motion to set aside a default is addressed to the discretion of the court. Any doubt should be resolved in setting aside defaults so that every case may be decided upon the merits. * * * "

To the same effect is *Huntington Cab Co.* v. *American Fidelity & Casualty Co.*, 4 F.R.D. 496; *Tozer* v. *Charles A. Krause Milling Co.*, 3 Cir. 189 Fed. (2nd) 242; and *Nunn* v. *Reina*, 21 F. R. D. 573.

The rationale used by the District Judge in refusing to open the default was that notice of the entry of the order was published in the New York Law Journal. It is submitted that, since the clerk is required to give notice of entry of orders, the petitioners are not charged with constructive notice by reason of such publication. The New York Law Journal is not an official publication such as the Federal Register.

However, even assuming, *arguendo*, that the petitioners' attorneys were negligent in failing to note the decision in the New York Law Journal, this is not sufficient cause to deny an application to open a default. The court's attention is respectfully called to *Barber* v. *Turberville*, 218 Fed. (2nd) 34(36), where the court said:

> "* * * That the defendant personally was not negligent in the protection of her interests appears clear from the facts recited. In situations such as the one here disclosed, the courts have been reluctant to attribute to the parties the errors of their legal representatives. * * *"

To the same effect is *Kantor Bros.* v. *Mutual Construction Co.*, 3 F.R.D. 227 and *Elias* v. *Pitucci*, 13 F.R.D. 13.

POINT VI

The facts herein did not justify the District Judge in granting the drastic penalty against the appellants under the facts set forth herein.

To understand the situation in this case it is necessary to point out the fact that this action has been pending for a long time. That at least two (2) appeals had been taken to the Circuit Court in connection with applications for preliminary injunctions, that the Circuit Court had both granted and denied injunctions *pendente lite* that the respondents have been harassing the petitioners with a variety of examinations, depositions, motions and what not all tending to prevent a prompt trial of this action. Whenever vexations and unnecessary depositions were called for and the petitioners would seek to limit or dispose of these unnecessary preliminaries, the respondents would always make charges of lack of cooperation and do everything in their power to prevent disposition of the suit.

The suit involved primarily the use of a trademark which the respondents claimed had acquired a special meaning, a contention disputed and put in issue by the petitioners.

In fact it became necessary to bring separate suits in connection with the petitioners' position in this matter and even then the respondent did everything in its power to precent a consolidation of the suits. It was impossible to answer some of the interrogatories unless all of the parties were before the court and unless there had been a consolidation of the actions. After long and drawn out proceedings the petitioners finally succeeded in having the actions consolidated—there had been no opportunity or possibility to answer the interrogatories in question until such consolidation had become effective. It was only then that the petitioners were confronted with the order of the court fixing a date for the completion of the interrogatories and such date had already elapsed when the petitioners obtained knowledge of same. Thereupon the petitioners promptly moved to be relieved of their default and it was then that the district court refused to give the petitioners the opportunity to answer the interrogatories, and when such interrogatories were finally served the respondents returned the same claiming that they were not served in time.

It is quite clear that the respondents sought to avoid coming to grips with the issues before the trial court and indulged in procedural motions for the sole purpose of *not* permitting the petitioners to cure any default which might have been charged against them.

The situation in the case at bar is quite analogous to that in *Gill* v. *Stolow,* 2 Cir. 240 Fed. (2nd) 669 (672), where this court said:

> "* * * In final analysis, a court has the responsibility to justice between man and man, and general principles cannot justify denial of a party's fari day in court except upon a serious showing of willful default. * * *"

Petitioners did not have the duty to answer the interrogatories until after the consolidation motion was granted. After this, and as soon as notice of Judge Ryan's order was received, the interrogatories were promptly answered. Rule 37 sanctions were not justified and certainly dismissal was not justified on this record.

POINT VII

All documents and papers were produced by petitioners in this case whenever an order was made for their production even in cases where the petitioners felt that the orders were too drastic and sought from time to time to limit the same.

Not a single document or paper required or a single question propounded to the petitioners remained unanswered whenever an order of the court required the production of such documents or the answer to a particular interrogatory. The petitioners had a right to oppose unjustified demands and whenever such opposition was resolved against the petitioners, the petitioners complied with an order of the court.

Reference is made in the opinion of the Circuit Court of Appeals to alleged "dilatory and contumacious conduct of plaintiffs and their counsel" in this matter. In the brief submitted by the respondent references are made to various intermediate motions which they claim were decided in a manner to show contempt for court orders, etc. An examination of the record will show that the statement has no bearing of the precise points raised in this case and does not provide any excuse for the court's failure to honor the Rules of Civil Procedure. To employ a drastic remedy like a judgment by default

where a suit has been pending for many years, where motions and cross-motions were made in the District Court and in the Circuit Court, where no attempt has been made to try the case on the merits, is clearly not a willful and deliberate default permitting the drastic remedy of a judgment in favor of the plaintiff and dismissing two other actions in which no attempt was ever made for any preliminary proceedings or the taking of depositions or noticing same for trial.

CONCLUSION

Certiorari should be granted in this case and the judgment vacated.

Dated: February 18, 1966

Respectfully submitted,

MAXIMILIAN BADER,
I. WALTON BADER,
Counsel for Petitioners,
170 Broadway,
New York, New York, 10038.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Opinion of the Court of Appeals for the Second Circuit

Before:

WATERMAN, MOORE, *Circuit Judges*, and
TYLER, *District Judge*.

Appeal from an order of the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Chief Judge*, striking out the answer of the defendant in Action No. 1, directing the entry of a default judgment in said action, dismissing Actions No. 2 and 3 and refusing the defendant in Action No. 1 permission to cure its alleged default.

Affirmed.

MAXIMILIAN BADER, New York, N. Y. (Bader & Bader, New York, N. Y., on the brief; Samuel Gutterman, New York, N. Y., of counsel), *for appellants*.

MILTON MOUND, New York, N. Y. (Mound, Isaacs & Greenburg, New York, N. Y., on the brief; Henry A. Greenburg, New York, N. Y., of counsel), *for appellees*.

PER CURIAM:

Beyond a peradventure, Chief Judge Ryan acted well within the limits of sound discretion in issuing his order filed May 4, 1965 wherein he refused to vacate the judgments of dismissal entered against plaintiffs-appellants in these consolidated actions on April 26, 1965. In view of the dilatory and contumacious conduct of plaintiffs and

their counsel in virtual definance of the rules and orders of at least six judges in the district court, the sanction of dismissal was reasonable and correct. *Nasser* v. *Isthmian Lines,* 331 F. 2d 124 (2 Cir. 1964); *Parker* v. *Broadcast Music, Inc.,* 289 F. 2d 313 (2 Cir. 1961). Moreover, there is no merit whatsoever in appellants' claim, ostensibly made under Rule 60(b)(1), Fed. R. Civ. P., that they did not receive proper notice of the trial court's order of April 6, 1965 requiring them to answer certain interrogatories within five (5) days; as Chief Judge Ryan observed in his May 4 order, the record establishes that notice of the April 6 order was timely mailed to counsel by the clerk's office and was also provided by publication in the New York Law Journal on April 8, 1965.

The order appealed from is affirmed with costs to appellees.

Original Opinion of the United States District Court for the Southern District of New York

Endorsement, April 7, 1965

SLUMBERTOGS, INC. v. JIGGS, INC., et al. 62 Civ. 2816

JOSEP LEVY, et al. v. SLUMBERTOGS, INC., et al. 63 Civ. 2933

JIGGS, INC., et al. v. HERBERT B. LEVENSON et al. 63 Civ. 2267

Endorsement

There are three separate suits before us. In *Slumbertogs, Inc.* v. *Jiggs, Inc., et al.* (62 Civ. 2816) filed in August, 1962, plaintiff, alleged owner of the trademark "Slumbertogs", seeks to enjoin defendant and its officers from using the trademark "Slumba-Togs". Defendants counterclaim alleging fraud in the federal registration of the mark "Slumbertogs" and violations of the Sherman and Robinson-Patman Acts. In *Joseph Levy, et al.* v. *Slumbertogs, Inc., et al.* (63 Civ. 2933) filed on October 8, 1963, and in *Jiggs, Inc. et al. Herbert B. Levenson, et al.* (63 Civ. 2267) filed on July 30, 1963, suits are brought by substantially the same defendants in the first suit against the plaintiff in that action, and allege the same claims pleaded in the counterclaims of the first suit.

Defendants in 62 Civil 2816 (plaintiffs in 63 Civil 2933 and 63 Civil 2267) move for consolidation of the three suits. (Rule 42(a), F.R.C.P.)

Plaintiff, in 62 Civil 2816, moves to strike defendants' answer and counterclaim and for judgment for plaintiff on the ground that defendants have refused to comply with orders for discovery. (Rule 37, F.R.C.P.) Plaintiff,

in 62 Civil 2816, also moves for the designation of a Rule 2(b) Judge (General Rules of this Court).

Motion for consolidation granted. Rule 42(a) F.R.C.P. permits consolidation of actions "involving a common question of law or fact". Defendants' counterclaims in 62 Civil 2816 alleging fraud in the registration of "Slumbertogs" trademark and violations of the Sherman and Robinson-Patman Acts, are identical to the complaints in 63 Civil 2933 and 63 Civil 2267. There are common questions of law and fact in all three suits.

Plaintiff's motion in 62 Civil 2816, pursuant to Rule 37, F.R.C.P., is denied, provided that defendants comply with the orders in question within five days from the date hereof. If defendants fail to comply within this period, plaintiff may submit an ex parte order and affidavit of default, granting judgment for plaintiff.

Plaintiff alleges that defendants have failed to answer certain interrogatories despite two orders of this Court. Plaintiff served these interrogatories on the defendants in November, 1964. Plaintiff states that on February 2, 1965, at pretrial part of this Court, Judge Cashin ordered defendants to answer these interrogatories not later than February 18, 1965. When defendants failed to serve their answers by February 23, 1965, Judge Cashin extended their time to answer until March 9, 1965. Defendants have still not answered the interrogatories. Defendants contend that Judge Cashin gave them until March 23, 1965 to answer. Plaintiff has not given us a copy of Judge Cashin's orders, and we have been unable to locate them in the docket book where plaintiff alleges that they were endorsed. In view of these facts, defendants are given an additional ten days from the date hereof in which to an-

swer. We will not, however, accept any delay beyond this period.

Plaintiff's motion in the suits as consolidated for a Rule 2(b) Judge is granted. Due to the crowded dockets, I am unable to appoint a Judge at this time, but until further order, all further motions in these suits shall be made returnable before me. A Rule 2(b) Judge will be designated as soon as possible.

62 Civil 2816 has been pending for more than two and a half years. There have been delays on both sides. Slumbertogs, Inc., was granted a preliminary injunction on December 21, 1962. Defendants appealed to the Court of Appeals and presented new documents; the defendants moved to dismiss the appeal and to remand the suit to the District Court. On March 4, 1963, the Court of Appeals remanded the action to the District Court and upon the remand, the preliminary injunction was dissolved but on July 23, 1963, the Court stayed this portion of its order until the Court of Appeals had determined any appeal. Plaintiff filed an appeal on July 30, 1963. The Court of Appeals filed its opinion on October 23, 1964, affirming denial of a preliminary injunction, and ordered all discovery to be completed within 20 days and that trial be set for as soon as possible thereafter, preferably within 30 days from the date of its order. It is not clear why this appeal took one year and three months, but plaintiff was prosecuting the appeal and certainly could have caused it to be determined much sooner. Defendants have caused much delay in the completion of pretrial discovery. In addition to their failure to answer the set of interrogatories propounded after the October 23, 1964 order of the Court of Appeals, they

caused several delays during the period that the appeal was pending. Judge Palmieri, on July 29, 1964, ordered that certain discovery proceedings be completed by August 6, 1964. He denied a motion made by defendants on August 3, 1964 to extend this time limit. Additional hearings were held on August 24, 1964 and September 2, 1964 in efforts to compel defendants to comply with this order. On September 2, 1964, Judge Palmieri finally entered an endorsement stating that the problems involved in his order had been solved. At the August 24, 1964 hearing, Judge Palmieri made the following statements concerning the defendants:

> "I have attempted to understand the so-called affidavit of compliance of the other side, and, Mr. Bader, I am profoundly shocked by the equivocations, incoherent, lack of frankness and obvious dilatoriness on the part of your client as well as your firm in complying with the order of this Court." p. 4
>
> "Your record of non-compliance, to put it mildly, is shocking." p. 5
>
> "I am not interested in your efforts because your efforts are nothing more than obfuscation, avoidance. That is all your efforts are. You have imposed for two years on your adversary." p. 6

We have had enough delay in these suits. There will be no further discovery by either side other than that ordered herein. Application may be made on or before April 19, 1965 before me to have this consolidated suit set down for trial for a day certain before a Judge to

be designated. If such application is not made prior to this date, an ex parte order is encountered by the Court dismissing all suits. So ordered.

Dated: April 6, 1965

SYLVESTER J. RYAN,
U. S. D. J.

Judgment Appealed From

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ORDER

[SAME TITLE]

Upon the order of Sylvester J. Ryan, Chief Judge of this Court entered April 6, 1965 whcih consolidated these actions, and the affidavit of Henry A. Greenburg, sworn to April 19, 1965, and, it appearing that the defendants in 62 Civil 2816 and the plaintiffs in 63 Civil 2933 and 63 Civil 2267 have failed to comply with the said order, it is

ORDERED, that defendants' answer and counterclaims in 62 Civil 2816 be and the same hereby is stricken and plaintiffs' complaints in 63 Civil 2933 and 63 Civil 2267 be and the same hereby are dismissed, and it is further

Judgment Appealed From

ORDERED, that defendants in 62 Civil 2816 be and they hereby are enjoined from offering for sale, selling delivering or otherwise using any garments bearing the trademark "Slumber-Togs", or any mark confusingly similar thereto, and it is further

ORDERED, that the Clerk of this Court shall enter judgment in favor of the plaintiff in 62 Civil 2816 and in favor of the defendants in 63 Civil 2933 and 63 Civil 2267, to the extent hereinbefore specified.

April 19th, 1965.

SYLVESTER J. RYAN
Chief Judge

Order Filed May 4, 1965

SLUMBERTOGS, INC. v. JIGGS, INC., et al,

JIGGS, INC., et al. v. HERBERT B. LEVENSON et al.

JOSEPH LEVY, et al. v. SLUMBERTOGS; INC., et al.

Endorsement

62 Civ. 2816

63 Civ. 2267

63 Civ. 2933

Defendant in 62 Civil 2816 and plaintiffs in 63 Civil 2933 and 63 Civil 2267 move in these consolidated actions to vacate the judgments entered against them on April 26, 1965.

Movants allege that they did not receive notice of our order dated April 6, 1965. In this order, we gave movants five days in which to answer certain interrogatories served on movants in November, 1964, which they had failed to answer despite two prior orders of this Court. We provided further in our April 6, 1965 order that, if these interrogatories were not answered within this period, an ex parte order, granting judgment to plaintiff in 63 Civil 2816 (defendants in 63 Civil 2933 and 63 Civil 2267), could be submitted. On April 26, 1965, movants had still not answered these interrogatories and we granted judgments.

We have checked the clerk's docket sheets in each of these three actions and, on each sheet car, there is a notation that notice of our April 6, 1965 order was mailed on April 7 to attorneys for movants. In addition, notice of our April 6, 1965 order appeared in the New York Law Journal on April 8, 1965. Our order of April 6, 1965 was

based on three motions, which were returnable before us on March 22, 1965. We heard argument on these motions on this date and reserved decision. Movants were represented by counsel at this hearing. Therefore, movants knew that these motions were sub judice and should have noticed the announcement in the Law Journal on April 8, 1965.

Movants are not entitled to have the judgments against them vacated; this application is denied; so ordered.

Dated: May 3, 1965.

SYLVESTER J. RYAN
U. S. D. J.

Notice of Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLES]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of I. Walton Bader sworn to January 26, 1965 the undersigned will move this court, before the Part I judge thereof, to be held at the courthouse, Foley Square, New York, New York, Room 128, on February 3, 1965 at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order permitting the defendants in Action No. 1 to move before the Motion Judge sitting in

Endorsement on Notice of Motion to Move for Extension of Time, etc.

Motion Part of this Court, for an order granting consolidation of the above-entitled actions pursuant to Rule 42(a) of the Federal Rules of Civil Procedure and permitting the undersigned to move before said Motion Judge for an order granting enlargement of the time for the defendants in Action No. 1 to answer certain interrogatories propounded by the plaintiff in Action No. 1 and for such other, further, and different relief as this court may deem just and proper.

Dated: January 26, 1965

Yours, etc.

BADER AND BADER
Attorneys for Defendants in
Action No. 1, Plaintiffs in
Actions No. 2 and No. 3

Endorsement on Notice of Motion to Move for Extension of Time, etc.

The Application "Granted."

So Ordered:

JOHN M. CASHIN
U. S. D. J.

Filed: Feb. 3, 1965.